2001

The State of Utah v. Danial Peterson : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellant, vs. DANIAL PETERSON, Defendant/Appellee.	Case No. 20010211-CA Priority No. 2

BRIEF OF APPELLANT

AN APPEAL FROM AN ORDER DISMISSING THE INFORMATION FILED AGAINST DEFENDANT IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH, UTAH COUNTY, JUDGE GUY R. BURNINGHAM PRESIDING

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BRIEF OF APPELLANT

* * *

STATEMENT OF JURISDICTION

The State appeals an order dismissing the information charging defendant with possession of a controlled substance in a drug free zone, a second degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (Supp. 1999), failure to respond to an officer's signal to stop, a third degree felony, in violation of Utah Code Ann. § 41-6-13.5 (Supp. 1999), possession of drug paraphernalia, a class A misdemeanor, in violation of Utah Code Ann. § 58-37a-5(2) (1998), and driving on a suspended or revoked operator's license, a class B misdemeanor, in violation of Utah Code Ann. § 53-3-227(3)(a) (1998). This Court has jurisdiction under Utah Code Ann. § 78-2a-3(2)(e) (1996).

STATEMENT OF THE ISSUES

1. Did the trial court err in dismissing the charges against defendant for failure to bring the case to trial within 120 days of defendant's disposition request, where the

proceedings were delayed 91 days because of defendant's motion to suppress and his motion to reconsider the court's denial of the motion to suppress?

Standard of Review. "[T]he trial court's factual determinations will not be disturbed unless clearly erroneous." *State v. Peterson*, 810 P.2d 421, 425 (Utah 1991). However, the court's "legal determinations concerning the proper interpretation of the statute which grants the trial court discretion are reviewed for correctness." *Id.*

2. Alternatively, did the trial court commit plain error when it dismissed all four charges pending against defendant under Utah Code Ann. § 77-29-1 (1999), where he identified only one charge in his request for disposition?

Standard of Review. This claim involves interpretation of a statute and, thus, presents a question of law reviewed for correctness. *State v. Maestas*, 2000 UT App 22, ¶11, 997 P.2d 314, *cert. denied*, 4 P.3d 1289 (Utah 2000); *State v. Fixel*, 945 P.2d 149, 151 (Utah App. 1997). Because the State did not object to the dismissal of all four charges before the trial court, this Court will review the claim for plain error. *See State v. Bakalov*, 1999 UT 45, ¶56, 979 P.2d 799. Plain error exists where an error occurs which is obvious and substantially prejudicial. *Id.*

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The interpretation of Utah Code Ann. § 77-29-1 (1999), set forth below, is relevant to a determination of this case:

(1) Whenever a prisoner is serving a term of imprisonment in the state prison, jail or other penal or correctional institution of this state, and there is pending against the prisoner in this state any untried indictment or information, and the prisoner shall deliver to the warden, sheriff or custodial officer in authority, or any appropriate agent of the same, a written demand specifying the nature of the charge and the court wherein it is pending and requesting disposition of the pending charge, he shall be entitled to have the charge brought to trial within 120 days of the date of delivery of written notice.

(2) Any warden, sheriff or custodial officer, upon receipt of the demand described in Subsection (1), shall immediately cause the demand to be forwarded by personal delivery or certified mail, return receipt requested, to the appropriate prosecuting attorney and court clerk. The warden, sheriff or custodial officer shall, upon request of the prosecuting attorney so notified, provide the attorney with such information concerning the term of commitment of the demanding prisoner as shall be requested.

(3) After written demand is delivered as required in Subsection (1), the prosecuting attorney or the defendant or his counsel, for good cause shown in open court, with the prisoner or his counsel being present, may be granted any reasonable continuance.

(4) In the event the charge is not brought to trial within 120 days, or within such continuance as has been granted, and defendant or his counsel moves to dismiss the action, the court shall review the proceeding. If the court finds that the failure of the prosecuting attorney to have the matter heard within the time required is not supported by good cause, whether a previous motion for continuance was made or not, the court shall order the matter dismissed with prejudice.

STATEMENT OF THE CASE[1]

On June 2, 2000, defendant was arrested for (1) possession of a controlled substance in a drug-free zone, a second degree felony; (2) failure to respond to an officer's signal to stop, a third degree felony; (3) possession of drug paraphernalia, a class A misdemeanor; and (4) driving on a suspended license, a class B misdemeanor. R. 04. After the State filed an information formally charging defendant, he requested a preliminary hearing. R. 01-02, 09.

[1]The underlying facts which are alleged to support the charges against defendant are not necessary to a determination of this appeal and are therefore not set forth herein.

On July 7, 2000, the court held a preliminary hearing and bound defendant over for trial on all four counts. R. 16, 153. At the conclusion of the preliminary hearing, defense counsel advised the court of his intent to file pretrial motions, presumably dispositive of the case. *See* R. 153: 33-35. The trial court established a motion schedule, setting oral argument for August 21, 2000. *See* R. 17-18; R. 153: 33-36.

On July 10, 2000, defendant prepared and signed a request for disposition of pending charges, delivering it to Lieutenant Scott Carter of the Utah County Jail. R. 88-90. The disposition request identified a pending charge for possession of methamphetamine in Fourth District Court, Case No. 001400283. R. 90. Although the district court apparently received a copy of the disposition request, which bore a case number different than the case here, it was never placed in the court file. *See* R. 147. The prosecutor had no record of ever receiving a copy of the disposition request. R. 159: 3-4.

On August 21, 2000, the trial court heard oral argument on defendant's suppression motion. R. 40-41; *see also* R. 31-34. The trial court denied defendant's motion and scheduled a pretrial conference for the purpose of setting a trial date. *See* R. 40-41; R. 155: 3.

On September 8, 2000, the court held the scheduled pretrial conference. R. 57-58, 155. There, defendant filed a Motion to Reconsider, asking the court to reconsider its ruling denying the motion to suppress. R. 47-55, 155. Rather than setting a trial date, the court continued the pretrial conference, reasoning that a trial would not be necessary if upon reconsideration, it granted defendant's motion to suppress. *See* R. 155: 3-6.

On September 29, 2000, the court advised the parties that it still had not ruled on the Motion to Reconsider. R. 156: 3-5. The court also asked, "We don't yet have a trial date in this case though, do we?" R. 156: 5. In defendant's presence, defense counsel responded:

> No. We do not, Your Honor. He is doing a year commitment at the present time so we're not under, there isn't a, he's not filing a 120 day disposition [request] . . .

R. 156: 5. The trial court scheduled another pretrial conference, at which time it would determine, based on its ruling on the motion, whether a trial date needed to be set at that time. R. 156: 5. The court initially suggested a setting for three weeks later, but due to a scheduling conflict of defense counsel, settled on a date four weeks later. R. 156: 5.

At the next scheduled pretrial conference on October 27, 2000, the trial court asked for further oral argument from counsel on defendant's motion to reconsider. R. 157: 3-4. Following argument by the respective parties, the court denied the motion and scheduled a trial for the next available date on the calendar—February 1-2, 2001. R. 157: 15-19; *see also* R. 77. Because defendant's court-appointed attorney would no longer be representing defendant, the court set another pretrial conference in December. R. 157: 19. The pretrial conference was held in December and another was set for January to resolve lingering issues regarding a requested lineup. *See* R. 79-80, 158.

At the pretrial conference on January 10, 2001, defendant filed a motion to dismiss, claiming the State had failed to bring the case to trial within 120 days of his request for disposition. R. 88-93; R. 159: 3-6; *see also* R. 97-98.

On January 30, 2001, the court heard oral argument from the respective parties. R. 154. The trial court thereafter granted defendant's motion to dismiss for failure to set trial within 120 days of the disposition demand. R. 99-104, 124-31, 136-40, 145-50, 154.[2] The State timely appealed. R. 141-42.

SUMMARY OF ARGUMENT

The detainer period commenced on July 10, 2000—the date defendant delivered his 120-day disposition request to the jailer. That period was extended 42 days because of delay occasioned by defendant's motion to suppress and another 49 days because of delay occasioned by defendant's motion to reconsider. This extended the detainer period to February 6, 2001—five days after the scheduled trial. The trial court therefore erred in concluding that the 42-day delay occasioned by the motion to suppress did not toll the detainer period. In any event, good cause existed for any delay extending beyond the detainer period. Although defendant had delivered to the jailer a disposition request, defense counsel represented that defendant was not filing a disposition request. The prosecutor's reliance on counsel's representation was reasonable inasmuch as the disposition request was not placed in the court file and a copy was never received by the prosecutor. In the alternative, the trial court committed plain error in dismissing all four charges in the information where defendant only identified one in his disposition request.

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[2]The trial court's Ruling, which detailed the reasons for granting the motion, was entered after the Order and Findings of Fact and Conclusions of Law. *See* R. 137-40, 145-50. The Ruling is reproduced in Addendum A.

ARGUMENT

I.

THE TRIAL COURT ERRED IN DISMISSING THE CHARGES AGAINST DEFENDANT

On defendant's motion, the trial court below dismissed the charges against him, concluding that the prosecution failed to bring the case to trial as required under Utah Code Ann. § 77-29-1 (1999). R. 137-40. That dismissal is reversible error.

Section 77-29-1 provides:

> (1) Whenever a prisoner is serving a term of imprisonment in the state prison, jail or other penal or correctional institution of this state, and there is pending against the prisoner in this state any untried indictment or information, and the prisoner shall deliver to the warden, sheriff or custodial officer in authority, or any appropriate agent of the same, a written demand specifying the nature of the charge and the court wherein it is pending and requesting disposition of the pending charge, he shall be entitled to have the charge brought to trial within 120 days of the date of delivery of written notice.
>
> (2) Any warden, sheriff or custodial officer, upon receipt of the demand described in Subsection (1), shall immediately cause the demand to be forwarded by personal delivery or certified mail, return receipt requested, to the appropriate prosecuting attorney and court clerk. The warden, sheriff or custodial officer shall, upon request of the prosecuting attorney so notified, provide the attorney with such information concerning the term of commitment of the demanding prisoner as shall be requested.
>
> (3) After written demand is delivered as required in Subsection (1), the prosecuting attorney or the defendant or his counsel, for good cause shown in open court, with the prisoner or his counsel being present, may be granted any reasonable continuance.
>
> (4) In the event the charge is not brought to trial within 120 days, or within such continuance as has been granted, and defendant or his counsel moves to dismiss the action, the court shall review the proceeding. If the court finds that the failure of the prosecuting attorney to have the matter heard within the time required is not supported by good cause, whether a previous

> motion for continuance was made or not, the court shall order the matter dismissed with prejudice.

Utah Code Ann. § 77-29-1 (1999). Like its predecessor, the purpose of section 77-29-1 is "to protect the constitutional right of prisoners to a speedy trial and to prevent those charged with enforcement of criminal statutes from holding over the head of a prisoner undisposed charges against him." *See State v. Trujillo*, 656 P.2d 403, 404-05 (Utah 1982) (citing purpose of predecessor statute); *accord State v. Viles*, 702 P.2d 1175, 1176 (Utah 1985) (citing purpose of section 77-29-1 in similar terms); *see also State v. Wilson*, 22 Utah 2d 361, 362, 453 P.2d 158, 159 (Utah 1969) (citing purpose of predecessor statute).

The burden of complying with the statute rests with the prosecutor. *State v. Heaton*, 958 P.2d 911, 915 (Utah 1998). Once a prisoner has delivered a disposition request, "the prosecutor has an affirmative duty to have the defendant's matter heard within the statutory period." *Id.* Thus, a defendant need not even object to a trial setting that falls outside the required time period. *Id*; *accord State v. Peterson*, 810 P.2d 421, 424 (Utah 1991). Instead, the prosecutor must "notify the court that a detainer notice has been filed," and he must otherwise "make a good faith effort to comply with the statute." *Heaton*, 958 P.2d at 915.

Determining whether charges were properly dismissed under section 77-29-1 requires a two-step inquiry. *Id.* at 916. "First, [the Court] must determine when the 120-day period commenced and when it expired. Second, if the trial [fell] outside the 120-day period, [the Court] must then determine whether 'good cause' excused the delay." *Id.* "[T]he trial court's factual determinations will not be disturbed unless clearly erroneous." *Peterson*, 810

P.2d at 425. However, the court's "legal determinations concerning the proper interpretation of the statute which grants the trial court discretion are reviewed for correctness." *Id.*

A. THE DISPOSITION PERIOD HAD NOT EXPIRED BEFORE THE TRIAL DATE.

1. The Detainer Period Commenced on July 10, 2000.

As explained, the Court must first determine "when the 120-day period commenced and when it expired." *Heaton*, 958 P.2d at 916. By the statute's plain terms, "the 120-day period commences on the date written notice is 'delivered to the warden, sheriff or custodial officer in authority, or any appropriate agent of the same.'" *Id.* (*quoting* Utah Code Ann. § 77-29-1(1)). The trial court found that defendant delivered his disposition request to Lieutenant Carter of the Utah County Jail on July 10, 2000. R. 149-50: ¶ 4. The State does not contest that finding.[3] Based on that date, the trial court therefore correctly determined that the 120-day disposition period commenced on July 10, 2000. R. 147-48; *see* Utah Code Ann. § 77-29-1(1); *Heaton*, 958 P.2d at 916.

2. The Detainer Period Did Not Expire Until February 6, 2001—5 Days After the Trial Setting.

The 120th day after July 10, 2000 was November 7, 2000. R. 147: ¶ 5. However, determining when the disposition period expired is not as simple as counting 120 days from the date the detainer period commenced. Any period of delay created by defendant during

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[3]Although the disposition request was apparently signed by defendant on July 10, 2000, nothing on the face of the document indicates when it was delivered to Lt. Carter. *See* R. 90. Clearly, however, the request was delivered no later than July 12, 2000—the date Lt. Carter appears to have forwarded it to the Fourth District Court. *See* R. 89. Absent any evidence to the contrary, the trial court's finding was not clearly erroneous. The disposition request is reproduced in Addendum B.

that period tolls the running of the time for bringing the case to trial. *See Heaton*, 958 P.2d at 916; *accord State v. Phathammavong*, 860 P.2d 1001, 1004-05 (Utah App. 1993). This is because "when a prisoner himself acts to delay the trial, he indicates his willingness to temporarily waive his right to a speedy trial." *Heaton*, 958 P.2d at 916. Accordingly, the "disposition period [is] extended by the amount of time during which defendant himself has created delay." *State v. Velasquez*, 641 P.2d 115, 116 (Utah 1982); *accord Heaton*, 958 P.2d at 916 (*citing Velasquez*, 641 P.2d at 116).

Here, the proceedings were delayed 42 days because of defendant's motion to suppress and another 49 days because of his motion to reconsider the trial court's denial of the motion to suppress. *See* R. 17-18, 31-34, 40-41, 47-55, 57-58, 153: 33-36, 155-57. These delays extended the detainer period from November 7, 2000 to February 6, 2001. However, while the trial court correctly determined that the 49-day delay resulting from defendant's motion to reconsider tolled the detainer period, it erred in concluding that the 42-day delay resulting from defendant's motion to suppress did not. *See* R. 145-47: ¶¶ 5, 9.

On July 7, 2000, following the conclusion of the preliminary hearing, defendant notified the court of his intention to file pretrial motions, presumably dispositive of the case. *See* R. 153: 33-34. Accordingly, the trial court did not set trial, but instead established a motion schedule, setting oral argument for August 21, 2000. R. 153: 35-36.[4] On August 21,

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[4]Pursuant to the motion schedule, defendant had three weeks to file any motions, the prosecutor had two weeks to file his responses, and defendant had another week to reply. R. 153: 35-36. Oral argument was set three days after defendant's replies were due. R. 153: 36.

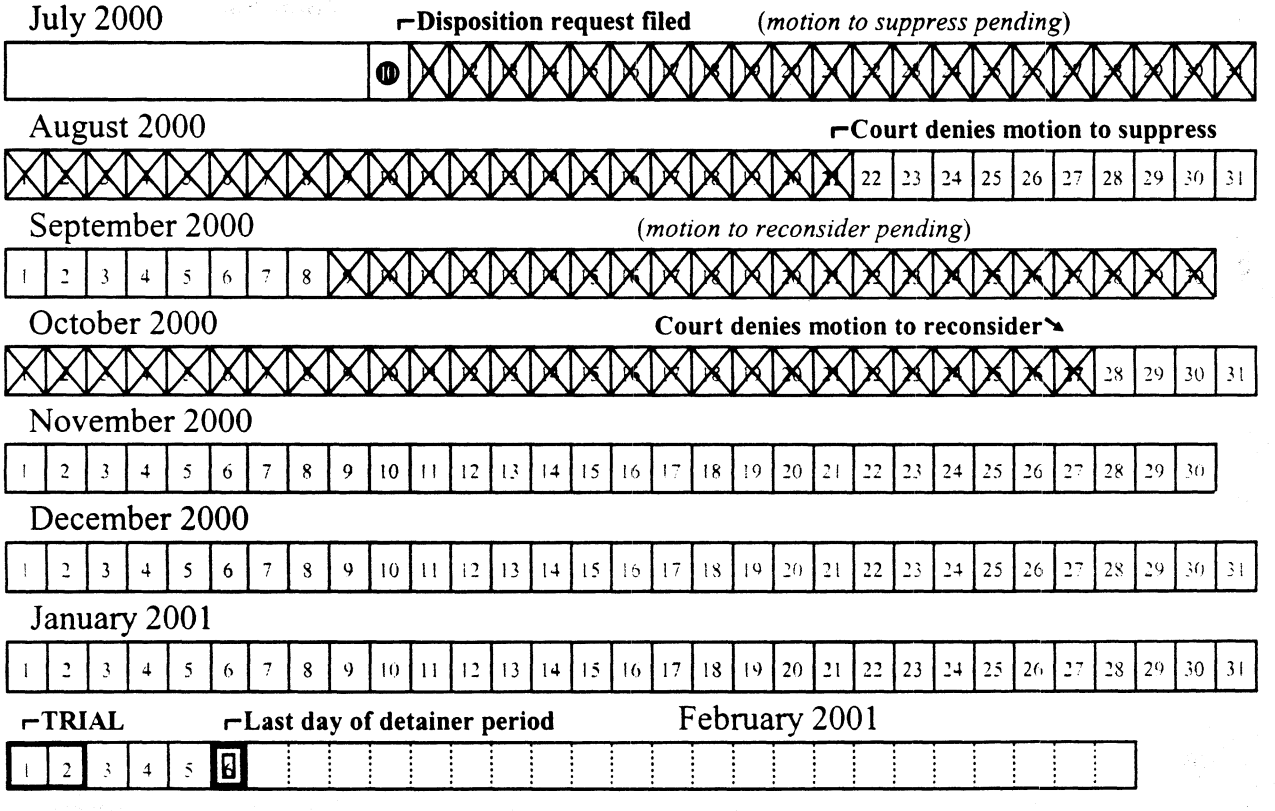
2000, after hearing oral argument, the trial court denied defendant's motion to suppress the evidence. R. 40. Defendant's decision to pursue a motion to suppress thus resulted in 42 days of delay, from July 10th to August 21st—the day the court denied defendant's motion.

The trial court did not extend the detainer period 42 days for the delay created by the motion to suppress. R. 146-47: ¶ 5. It reasoned that the detainer period is set at 120 days "perhaps to accommodate foreseeable motions such as suppression motions and other circumstances that often arise in bringing a case to trial." R. 145: ¶ 9. That reasoning, however, is inconsistent with decisions of the Utah Supreme Court. Delays resulting from pretrial motions brought by the defendant have been held to toll the 120-day detainer period. *See State v. Banner*, 717 P.2d 1325, 1329-30 (Utah 1986) (tolling the time for motion to dismiss and motion to exclude evidence of prior crimes). The high court has even attributed to defendant delay occasioned by his request for a preliminary hearing. *Heaton*, 958 P.2d at 916. As such, it was error for the court not to extend the detainer period by the delay created by defendant's motion to suppress.

The trial court recognized the propriety of not setting a trial date while the motion to reconsider was pending "because if the court found that the evidence should be suppressed the prosecution would most likely have had to dismiss the case." R. 146: ¶ 5. The same rationale applies with equal force to the motion to suppress. Courts can ill afford to schedule trials where a motion is pending that might make a trial unnecessary. Failure of a court to anticipate that possibility could result in empty calendars, unnecessarily delaying proceedings

in other cases. Accordingly, the foreseeable delay occasioned by a pretrial motion, such as a motion to suppress, is reasonably charged to the defendant.

In sum, just as the court attributed to defendant the 49-day delay created by his motion to reconsider, it also should have charged to defendant the 42-day delay created by his motion to suppress. In pursuing the motion to suppress and motion to reconsider, defendant "indicate[d] his willingness to temporarily waive his right to a speedy trial." *See Heaton*, 958 P.2d at 916. Therefore, as the graphic below demonstrates, the detainer period should have been extended not by 49 days, but by 91 days, leaving the prosecution until February 6, 2001 to bring the case to trial. Where trial was scheduled to begin February 1, 2001, the prosecutor would have complied with the detainer statute but for the dismissal.



B. GOOD CAUSE SUPPORTED ANY SETTING AFTER THE DISPOSITION PERIOD.

Assuming arguendo the detainer period had expired, good cause excused the delay. *See Heaton*, 958 P.2d at 916. Pursuant to subsection (4) of the detainer statute, failure of the prosecutor to have the matter heard within the detainer period may be excused upon a showing of good cause. Utah Code Ann. § 77-29-1(4); *Peterson*, 810 P.2d at 424. In this case, defendant led the prosecution, as well as the court, to believe that no disposition request had been filed. This misrepresentation was compounded by the court's apparent failure to enter the request in the court file and the prosecutor's lack of any notice of a disposition request.

At a pretrial conference on September 29, 2000, while defendant's motion to reconsider was still pending, the trial court expressed concern that a trial date had not yet been set:

> Well, since the motion is pending I suppose I had better do a ruling on it. And I would like to really consider it so that I, realizing that either side may have a right to appeal I'd better make sure I've done what I need to do. So since that's under advisement . . . We don't yet have a trial date in this case though, do we?

R. 156: 4-5. As the Supreme Court in *Heaton* made clear, defendant had no duty at this juncture to advise the court that he had filed a disposition request or to otherwise insist on a timely trial setting. *Heaton*, 958 P.2d at 916. However, defendant did not simply remain silent. Instead, counsel replied:

> No. We do not, Your Honor. He is doing a year commitment at the present time so we're not under, there isn't a, ***he's not filing a 120 day disposition [demand]*** . . .

R. 156: 5 (emphasis added). In making that representation to the court, defendant effectively abandoned any prior disposition request. Counsel's remarks certainly led both the court and prosecutor into a false sense of security regarding the necessity of obtaining a quick trial setting.

Defendant reinforced that belief at the October 27th pretrial conference. Initially, defense counsel told the trial court that although defendant was currently serving a one-year commitment on another case, defendant "want[ed] to get these [charges] cleared up . . . as quickly as possible." R. 157: 18; *see also* R. 157: 19 (stating that defendant "would obviously prefer something sooner," but remarking, "But, you know, if you can't do it, you can't do it"). Later, however, when discussing a lineup order, counsel represented:

> We have plenty of time. We don't want to disturb the trial date or anything. [Judge indicates "Okay."] We already think its too far off. And if it came right down to it we wouldn't, you know, we're not going to make a big deal out of it (short inaudible, no mic) three months makes a big deal out of it.

R. 157: 26. Defendant thus reinforced its prior representation that he was not insisting on a trial within 120 days.

The prosecutor's implicit reliance on these representations was reasonable because he had no notice of the disposition request. He had not received a copy of the request from the jailer as required by statute. *See* R. 159: 3-4; Utah Code Ann. § 77-29-1(2). Moreover, the court never placed the disposition request in the court file. R. 147: ¶ 4 & n.3.[5] Even had

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[5]The request for disposition delivered to the court by the jailer still does not appear in the court file. The only copy of the request appearing in the record is that which is attached to defendant's motion to dismiss. *See* R. 88-93.

the prosecutor received notice of the prior request, defense counsel's representation was tantamount to an abandonment of his speedy trial demand.

This case is not like *Heaton* where the case "fell through a crack in the prosecutor's office." *Heaton*, 958 P.2d at 915. There, trial was delayed by at least 60 days because the court clerk had failed to reassign the case after the original judge recused himself. *Id.* at 913, 915. The "administrative glitch" by the court did not constitute good cause because implicit in the prosecutor's duty to have the matter heard within the statutory period "is the duty to notify the court that a detainer notice has been filed and to make a good faith effort to comply with the statute." *Id.* at 916. Although the prosecutor had notice of the request, he did nothing to bring the matter to trial in a timely manner. *Id.* at 915-16. Here, however, the prosecutor never had that opportunity because he did not receive a copy of the notice, nor did the court provide constructive notice by entering its copy in the file. Indeed, the reason remains unclear why the request was never placed in the court file, though perhaps defendant's misidentification of the case number had something to do with that.[6] The prosecutor had no way of knowing that he had any such duty. Moreover, defense counsel represented that they were not filing a disposition request. Accordingly, any delay extending beyond the detainer period was excused for good cause.

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[6]The district court number was 001402**283**, but defendant identified it as case number 001400**283**. *See* R. 90.

II.

ALTERNATIVELY, THE COURT COMMITTED PLAIN ERROR BY DISMISSING THREE CHARGES WHICH WERE NOT INCLUDED IN DEFENDANT'S DISPOSITION REQUEST

Should this Court determine that the trial court properly calculated the disposition period and properly rejected the prosecutor's good cause claim, it should nevertheless examine the scope of the dismissal order. The trial court committed plain error in dismissing all four of the charges pending against defendant based on violation of section 77-29-1. Defendant invoked the statute only as to the methamphetamine charge. He did not invoke the statute as to the remaining three charges. Accordingly, the State should be free to pursue them against defendant.

Because the prosecutor failed to raise this issue below, it is reviewed on appeal for plain error. To establish plain error, the State must show that "(i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful." *State v. Dunn*, 850 P.2d 1201, 1208 (Utah 1993); *see also State v. Adams*, 2000 UT 42, ¶20, 5 P.3d 642.

Section 77-29-1 details the steps defendant must take to properly invoke the statute:

> (1) Whenever a prisoner is serving a term of imprisonment in the state prison, jail or other penal or correctional institution of this state, and there is pending against the prisoner in this state any untried indictment or information, and the prisoner shall deliver to the warden, sheriff or custodial officer in authority, or any appropriate agent of the same, a written demand specifying *the nature of the charge* and the court wherein it is pending and requesting *disposition of the pending charge*, he shall be entitled to have *the charge* brought to trial within 120 days of the date of delivery of written notice.

> (4) In the event *the charge* is not brought to trial within 120 days, or within such continuance as has been granted, and defendant or his counsel moves to dismiss the action, the court shall review the proceeding. If the court finds that the failure of the prosecuting attorney to have *the matter* heard within the time required is not supported by good cause, whether a previous motion for continuance was made or not, the court shall order *the matter* dismissed with prejudice.

Utah Code Ann. § 77-29-1 (emphasis added).

The plain and unambiguous language of the statute requires that in order for a defendant's written disposition request to be effective, it must expressly include: (1) the nature of the charge; (2) the court in which the charge is pending; and (3) a request for disposition "of the pending charge . . ." Utah Code Ann. § 77-29-1(1). Defendant submitted a written disposition notice, but it only identified the "Poss of Meth" charge, which reasonably refers to count I in the information charging defendant with possession or use of a controlled substance in a drug-free zone. *See* R. 1-2, 90. However, defendant was also charged with failure to respond to an officer's signal to stop, possession of drug paraphernalia, and driving on a suspended or revoked operator's license. R. 1-2. Defendant's failure to even mention the remaining three charges in his disposition request prevents application of section 77-29-1 to those charges. *See, e.g., Aranza v. State*, 444 S.E.2d 349, 350 (Ga. App. 1994) (defendant's demand, which failed to identify the charges upon which he demanded a speedy trial by name, date, term of court, or case number "cannot reasonably be construed as sufficient to put the authorities on notice of a defendant's intention to invoke the extreme sanction" of dismissal; hence the time never commenced).

The only description of the nature of the charges defendant sought to include in his written disposition request is the phrase "Poss of Meth." That phrase does nothing to identify the remaining charges, let alone impart the nature of those charges, and it gives no notice of defendant's desire to have the remaining charges promptly disposed of. Those charges were viable independent of the State's ability to prove unlawful possession of a controlled substance. The simple fact that all the offenses were discovered at the same time and charged in the same information does not relieve defendant of his burden of identifying the nature of each pending charge in order to impose upon the State the burden of complying with the speedy trial statute. Neither is defendant relieved of that burden by the presumption that the prosecutor knew of the existence of the charges. *Cf. State v. Wright*, 745 P.2d 447, 451 (Utah 1987) (letter from defense counsel to the county attorney inquiring about prosecution of defendant did not trigger section 77-29-1 because, among other things, the letter did not "specify the charges, as required by section 77-29-1(1)."); *Viles*, 702 P.2d at 1176 (a notice of appearance filed by defendant's counsel, including a plea of "not guilty" and a request that defendant be granted a trial upon the charge, was not sufficient to meet the requirements for invoking section 77-29-1 because, among other things, it "did not specify the nature of the charge").

Because prosecution of the State's case lies in the balance under this statute, strict compliance by defendant with the minimal requirements to trigger the statute should be required. Defendant need only provide a minimum of readily-available information in writing to his custodial authorities, who then are responsible for adding additional

information and actual delivery of the disposition request to the appropriate entities. Utah Code Ann. § 77-29-1; *Heaton*, 958 P.2d at 915-16; *Wright*, 745 P.2d at 450-51; *Viles*, 702 P.2d at 1175. Charges must be pending before defendant may invoke the statute, making it easy for the defendant to identify the nature of the pending charges and the court having jurisdiction. Utah Code Ann. § 77-29-1(1). There is no need for any entity involved in the prosecution or management of the case to have to guess as to the scope of the disposition request.

In this case, defendant submitted his written disposition request after the charges were filed and after he had been appointed counsel. He was in the best position possible to determine and include in his disposition request all the charges he intended to submit to this expedited process. It is not unduly burdensome to require under these circumstances that proper invocation include, at a minimum, identifying each pending charge defendant intends the disposition request to cover, especially as the penalty for the State's failure to act promptly under the statute is extreme–dismissal with prejudice of all identified pending charges.

Because the disposition request fails to name three of the four charges pending against defendant, let alone identify the nature of those charges, the statute was not properly invoked as to those charges. The error in dismissing the three charges was obvious given the express language of both the statute and the disposition request, and it was prejudicial in that it prevented further prosecution of all three unnamed charges. Accordingly, dismissal of those three charges should be reversed and proceedings allowed to continue as to them.

CONCLUSION

For the foregoing reasons, the State respectfully requests the Court to reverse the trial court's order dismissing the charges against defendant, or alternatively, to affirm only the dismissal of count I charging unlawful possession of controlled substances in a drug-free zone.

Respectfully submitted this 23rd day of July, 2001.

MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL

JEFFREY S. GRAY
ASSISTANT ATTORNEY GENERAL
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of July, 2001, I served two copies of the attached Brief of Appellant upon the defendant/appellee, DANIAL PETERSON, by causing them to be mailed, via first class mail, postage prepaid, to his counsel of record, as follows:

MARGARET P. LINDSAY
Aldrich, Nelson, Weight & Esplin
43 East 200 North P.O. Box "L"
Provo, UT 84603-0200

Jeffrey S. Gray
Assistant Attorney General

ADDENDA

Addendum A

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

STATE OF UTAH Plaintiff, vs. DANIAL JOHN PETERSON, Defendant.	**RULING** 3/19/01 SP CASE NO. 001402283 DATE: March 19, 2001 JUDGE: GUY R. BURNINGHAM

This matter came before the Court upon Defendant's Motion to Dismiss based upon the State's failure to bring the case to trial within 120 days of the defendant filing a demand for disposition pursuant to Utah Code Ann. 77-29-1.

FACTUAL BACKGROUND

1. On June 2, 2000, the defendant was arrested for possession of a controlled substance in a drug free zone, failure to stop at the command of a police officer, possession of drug paraphernalia in a drug free zone, and driving on a suspended or revoked drivers licence.

2. On June 13, 2000, bail was set at $2500.00 cash or bond.

3. On July 7, a preliminary hearing was held and the defendant was bound over on all charges. The defendant entered not guilty pleas to all counts. Counsel for defendant indicated that he would be filing a motion to suppress, the Court scheduled oral arguments on the motion for August 21, 2000.

4. On July 10, 2000,[1] Lieutenant Scott Carter of the Utah County Jail, received a 120

[1]It is unclear from the documents provided to the court whether Lt. Carter received the written notice on July 10, 2000. It is clear however that the defendant sent the written notice as required on July 10, 2000. It is also clear that Lt. Carter received notice on or before July 12, 2000, because on this date he forwarded the demand to the Fourth District Court. This explanation is for clarity only because whether the 120-day period commenced on July 10th or

day disposition request from the defendant, Danial Peterson, as required under Utah Code Ann. § 77-29-1. On July 12, 2000, Lt. Carter sent a copy of the request to the Fourth District Court.

5. On August 21, 2000, the Court heard arguments on the defendant's motion to suppress. The Court denied the motion, and a pretrial conference was scheduled for September 8, 2000.

6. On September 6, 2000, upon request by the defendant and stipulation from the State, an Order was signed by the Court ordering a criminal identification lineup.

7. On September 8, 2000, the date for the pretrial conference, with defendant present, counsel for defendant filed a Motion to reconsider denial of the previous motion to suppress, which the court agreed to take under advisement. The pretrial conference was continued due to the new motion to reconsider.

8. On September 29, 2000, the parties returned for a pretrial conference. The motion had not been ruled upon, so the pretrial conference was continued until October 27, 2000.

9. On October 27, 2000, the Motion to Reconsider was denied. Trial was scheduled for February 1st and 2nd 2001.

10. On January 10, 2001, the defendant filed a motion to dismiss

11. On January 12, Mr. Peterson filed an amended motion to dismiss.

12. On January 16, 2001, the State filed a memorandum in opposition of the motion to dismiss.

13. On January 25, 2001, the defendant filed a response to the State's opposition of the motion to dismiss.

14. On January 30, 2001, oral arguments were heard by the Court.

The Court, having reviewed the file, considered the memoranda of counsel, and upon being advised in the premises, now issues the following:

RULING

1. The Utah detainer statute provides in relevant part:

(1) Whenever a prisoner is serving a term of imprisonment in the state prison, jail or

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July 12th 2000 is irrelevant to the motion, as the two days did not materially impact the length of the delay in this case.

other penal or correctional institution of this state, and there is pending against the prisoner in this state any untried indictment or information, and the prisoner shall deliver to the warden, sheriff or custodial officer in authority, or any appropriate agent of the same, a written demand specifying the nature of the charge and the court wherein it is pending and requesting disposition of the pending charge, he shall be entitled to have the charge brought to trial within 120 days of the date of delivery of written notice.

(3) After written demand is delivered as required in Subsection (1), the prosecuting attorney or the defendant or his counsel, for good cause shown in open court, with the prisoner or his counsel being present, may be granted any reasonable continuance.

(4) In the event the charge is not brought to trial within 120 days, or within such continuance as has been granted, and defendant or his counsel moves to dismiss the action, the court shall review the proceeding. If the court finds that the failure of the prosecuting attorney to have the matter heard within the time required is not supported by good cause, whether a previous motion for continuance was made or not, the court shall order the matter dismissed with prejudice.

Utah Code Ann. § 77-29-1(1), (3), & (4).

2. Deciding whether to grant the motion to dismiss pursuant to the detainer statute requires a two-step inquiry. First, it must be determined when the 120-day period commenced and when it expired. *State v. Heaton*, 958 P.2d 911, 916 (Utah 1998). "Second, if the trial was held outside the 120-day period, we must then determine whether 'good cause' excused the delay." *Id.*

3. The Utah detainer statute clearly provides that a prisoner is entitled to have charges brought to trial within 120 days of the date of delivery of written notice to the "warden, sheriff or custodial officer in authority." Utah Code Ann. § 77-29-1(1). The 120-day period begins the date that this notice is received by the appropriate authority. *Id; see also Heaton*, 958 P.2d at 916. The lieutenant at the Utah County Jail received Mr. Peterson's notice on July 10, 2000, thus

initiating the 120-day period.[2]

4. The statute also requires that the warden send notice to the "appropriate prosecuting attorney and court clerk." Utah Code Ann. § 77-29-1(2). The Fourth District Court received a copy of the disposition by certified mail.[3] There is no evidence however, that the Utah County Attorney's Office received notice of the demand. The fact that the prosecuting attorney did or did not receive notice is immaterial as to the initiation of the 120-day period. The responsibility of the defendant is to deliver "a written demand specifying the nature of the charge and the court wherein it is pending and requesting disposition of the pending charge." Utah Code Ann. § 77-29-1(1). Once this requirement is satisfied, the defendant has met his requirement under the statute and the burden falls upon the prosecution.[4] The fact that the warden or lieutenant did not deliver the demand or that the demand was lost at the receiving end cannot be attributed to or counted against the defendant.

5. The 120-day period commenced on July 10, 2000; with no delays, the 120-day period would have expired on November 7, 2001. The disposition period, however, is extended the amount of time that the prisoner himself acts to delay the trial. *See State v. Velasquez*, 641 P.2d 115, 116 (Utah 1982). Peterson did cause a delay in the trial date scheduling. The defendant indicated at the conclusion of the preliminary hearing that he would be filing a motion to suppress. This motion was heard by the Court on August 21, 2000, at which time the motion was denied. The parties returned on September 8, 2000 for a pretrial conference to schedule a trial date. During this appearance, the defense filed a motion to reconsider the previous denial of the motion to suppress. The Court agreed, with no objection from the state, to consider the motion,

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[2] See footnote 1.

[3]The certified mail receipt to the court was signed but by some error never made it to the file, therefore the Court did not have notice of the disposition. The State is not responsible for the administrative mistakes of the court but the burden of bringing the charges to trial within the 120-day period does not fall on the court, this burden lies solely upon the prosecution. See *Heaton*, 958 P.2d at 915.

[4] "When a prisoner delivers a written notice pursuant to the detainer statute, the prosecutor has an affirmative duty to have the defendant's matter heard within the statutory period." *Heaton*, 958 P.2d at 915.

therefore, the pretrial conference was continued and no trial date was set because if the court found that the evidence should be suppressed the prosecution would most likely have had to dismiss the case. The 49 days between September 8, 2000 and October 27, 2000, when the motion to reconsider was denied and a trial date was set, cannot be counted as part of the 120-day disposition period.

Excluding the 49-day delay attributable to Peterson, the State had until December 26, 2000, to bring Peterson to trial, this did not happen.

6. The second step is to determine whether "good cause" excused the delay under § 77-29-1(4). The original trial date was set at a pretrial conference on October 27, 2000 for February 1, and 2, 2001. There were no other dates suggested although counsel for Peterson stated that he would prefer an earlier date. There were no scheduling conflicts between counsel. There was no continuance motioned for or granted. On October 27, 2000, the Court set another pretrial conference for December 8, 2000, which was continued, but this did not affect the trial date scheduled for February 1 and 2, 2001.

7. The burden to bring the case to trial is not on the defendant. Although he did not state that he had a 120-day disposition pending during scheduling of the trial, there is no indication in the statute that the defendant has any duty beyond giving the written notice to the proper authorities in the jail or prison. See *State v. Peterson*, 810 P.2d 421, 424 (Utah 1991)(holding that defendant did not have to object to trial date in order to maintain his rights under the statute).

8. The first trial date set was for February 1 and 2, 2001. This date clearly falls outside of the 120-day period even accounting for defendant's delays. This case is distinguishable from *Heaton*. In *Heaton* there was a trial date set within the 120 day period, shortly before trial the defendant requested a preliminary hearing, which he had previously waived. The trial court then tried to accommodate a trial on the last day before the 120-day period expired but defense counsel was not available on that date. The *Heaton* court held that "extending the trial date to a reasonable time outside the disposition period to accommodate, in part, defense counsel's schedule constitutes 'good cause' under section 77-29-1(3) and (4)." *Heaton*, 958 P.2d at 917. No such scheduling conflict arose in this case. The trial was set for February 1 and 2, 2001 and it

was maintained. Defense counsel changed from the date of scheduling but the trial date remained.

9. The 120-day period was established, adding 30 days from the previous statutory 90-day detainer period, perhaps to accommodate foreseeable motions such as suppression motions and other circumstances that often arise in bringing a case to trial. The trial date, however, was never set within the 120-day period.

10. Section 77-29-1(3) allows the court to grant reasonable continuances upon showing of good cause. There were no continuances granted or requested. The fact that the prosecution did not receive notice could possibly be seen as good cause, but the fact that the prosecution has an affirmative duty suggests that inaction and/or ignorance is not enough for a showing of good cause for failure to have the matter heard within the time required. The failure of the proper authorities at the jail to deliver the disposition or loss upon receipt cannot prejudice the defendant's right to have his case brought to trial within the requisite time. The defendant cannot be required to bear the burden of the proper jail authorities in delivering the demand, nor the burden of the prosecution in bringing the case to trial within the 120-day period. The opportunity for abuse is evident if this were required.

Therefore, the failure to have the matter heard within the time required is not supported by good cause. The defendant's motion to dismiss is GRANTED, with prejudice.

Dated this 19 day of March, 2001.

Guy R. Burningha
Fourth District Co

ORIGINAL IF IN RED INK
STATE OF UTAH
FOURTH DIST. COURT · UTAH COUNTY

cc: Jared Eldridge
David Wayment

Addendum B

Utah County Sheriff

DAVID R. BATEMAN, SHERIFF

Notice of 120 DAY DISPOSITION

TO: FOURTH DISTRICT COURT

FROM: LT. SCOTT CARTER - UTAH COUNTY JAIL

DATE: July 12, 2000

RE: 120 DAY DISPOSITION FOR Danial Peterson

Enclosed is a copy of a request for a 120 Day Disposition I received from one of our inmates, Danial Peterson. Mr. Peterson claims to have an outstanding information in your court. Case #001400283.

STREET ADDRESS: *3075 N. Main, Spanish Fork, UT 84660*
MAILING ADDRESS: *P.O. Box 1547, Provo, UT 84603*
PHONE: *(801) 343-4000*
FAX: *(801) 343-4019*

ENTER INMATE REQUEST AND GRIEVANCE FORM #. 14485

UTAH COUNTY SHERIFF'S DEPARTMENT
UTAH COUNTY JAIL

NOTICE AND REQUEST FOR DISPOSITION OF PENDING CHARGES

TO: JAIL COMMANDER, UTAH COUNTY JAIL

Notice is hereby given that I, David Peterson, do hereby request final disposition of any charges now pending against me in any court in the State of Utah. Charge(s) are now pending against me in the court(s) listed below:

CHARGE		COURT
Poss of Meth	pending in	4th District ~~Court~~ 001400283
	pending in	
	pending in	

(List any additional charges and courts on the back of this form.)

Request is hereby made that you forward this notice to the appropriate authorities pursuant to Utah Code Annotated 77-29-1, et. seq. together with such information as required by law.

Dated this 10 day of July, ~~199~~ 2000

Inmate's signature

Utah County Sheriff

DAVID R. BATEMAN, SHERIFF

Notice of 120 DAY DISPOSITION

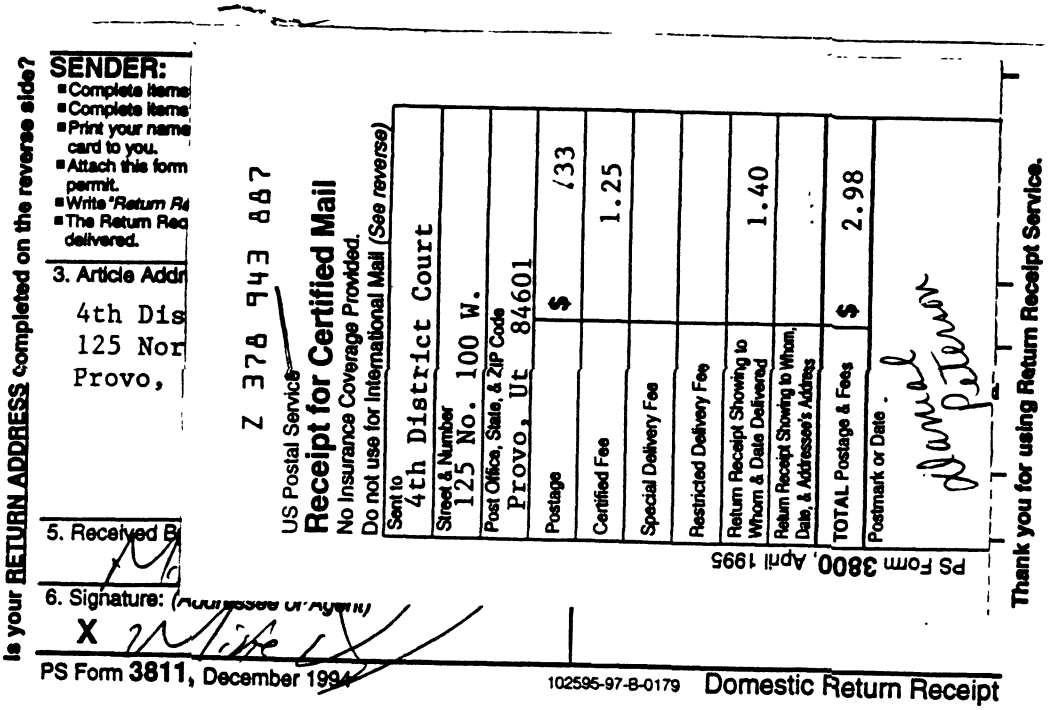
TO: FOURTH DISTRICT COURT

FROM: LT. SCOTT CARTER - UTAH COUNTY JAIL

DATE: July 12, 2000

RE: 120 DAY DISPOSITION FOR Danial Peterson

Enclosed is a copy of a request for a 120 Day Disposition I received from one of our inmates, Danial Peterson. Mr. Peterson claims to have an outstanding information in your court. Case #001400283.



SENDER:
- Complete items
- Complete items
- Print your name card to you.
- Attach this form permit.
- Write "Return Re
- The Return Rec delivered.

3. Article Addr
4th Dis
125 Nor
Provo,

5. Received B

6. Signature: (Addressee or Agent)
X

PS Form 3811, December 1994

Is your RETURN ADDRESS completed on the reverse side?

Z 378 943 887

US Postal Service
Receipt for Certified Mail
No Insurance Coverage Provided.
Do not use for International Mail (See reverse)

Sent to	4th District Court
Street & Number	125 No. 100 W.
Post Office, State, & ZIP Code	Provo, Ut 84601
Postage	$ .33
Certified Fee	1.25
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to Whom & Date Delivered	1.40
Return Receipt Showing to Whom, Date, & Addressee's Address	
TOTAL Postage & Fees	$ 2.98
Postmark or Date	Danial Peterson

PS Form 3800, April 1995

Thank you for using Return Receipt Service.

102595-97-B-0179 Domestic Return Receipt

STREET ADDRESS: 3075 N. Main, Spanish Fork, UT 84660
MAILING ADDRESS: P.O. Box 1547, Provo, UT 84603
PHONE: (801) 343-4000
FAX: (801) 343-4019

UTAH COUNTY SHERIFF'S DEPARTMENT
Correctional Division

Inmate Request and Grievance Form

Inmate Name Peterson Daniel #118380 Cell Block SOIC

Date 7-12-00 Check One: [ ] Good Time [ ] Grievance [ ] Legal Material
[ ] Cell Change [ ] Appeal [ ] Medical
[X] Other (specify) 120 Day Disposition

Request I would like too file 120 day V Disposition for UTAH County 4th District and 3rd V District courts in Salt Lake County here is the case # for the Utah County case

Thank you
D- Peterson

Please send back, he needs the request for 120 disposition.

Do not write below this line. For official use only

Received by C. [illegible] Date 7/12/00 Time 1937

Routed to: [ ] Jail Commander [ ] Administration [ ] Classification [ ] Medical
[ ] Other (specify) Lt. Carter

Answer : We completed and mailed your 120 Day Dispositionxxx Today.

Disposition by: Lt Carter Date 7-12-00 Time 1330hrs.

Returned to Inmate by: _____ Date _____ Time _____

Original - Inmate file; Yellow - Inmate